

Federal Communications Commission

DA 95-13

FEDERAL SECTION

Jan 12 11:11 AM '95
 Before the
 Federal Communications Commission
 Washington, D.C. 20554

MM Docket No. 95-2

In the Matter of

Amendment of Section 73.202(b) RM-8502
 Table of Allotments.
 FM Broadcast Stations.
 (Charlotte Amalie, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 4, 1995; Released: January 12, 1995

Comment Date: March 6, 1995

Reply Comment Date: March 21, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Virgin Islands Youth Development Radio, Inc., permittee of Station WIUJ(FM), Channel 275D, Charlotte Amalie, Virgin Islands ("petitioner"), proposing the allotment of Channel 275A at Charlotte Amalie and its reservation for noncommercial educational use, and the modification of its construction permit accordingly.¹ Although petitioner failed to state its intention to apply for the channel if allotted, petitioner rectified this omission in an amendment to the petition.²

2. In support of its proposal, petitioner states that the allotment of Channel 275A for noncommercial educational use at Charlotte Amalie would allow Station WIUJ(FM) to operate without interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico. According to petitioner, in 1977 its initial permit for Channel 205D was granted on the basis that the transmitter power output would not exceed 10 watts. However, terrain factors were not considered. In 1990, WIUJ(FM) requested a Special Temporary Authorization to operate on Channel 275D because of interference, which was denied. On March 5, 1992, Station WIUJ(FM)'s construction permit application (BPED-910506MI) for per-

manent operation on Channel 275D was granted. Station WIUJ(FM) began operating on program test authority on Channel 275D and on March 1, 1993, filed a license application (BLED-930301KG), which is pending.³ By operating on Channel 275D, the interference was eliminated. However, petitioner claims that Station WIUJ(FM) cannot move back to the noncommercial educational band to achieve Class A status without causing excessive interference to Station WIPR-TV, which is in violation of Section 73.525 of the Commission's Rules. Moreover, petitioner contends that the very high HAAT of its site precludes reducing power to levels which would comply with the Commission's Rules. Petitioner states that there are no Class A channels available in the noncommercial educational band that would provide sufficient elevation in order to provide city grade coverage and also comply with the interference limitations of Section 73.525. Petitioner asserts that since Station WIPR-TV is reluctant to grant Station WIUJ(FM) an interference waiver, it can now only achieve Class A status in the commercial portion of the FM band. Petitioner further claims that the allotment of Channel 275A meets all technical requirements and the reservation of the channel for noncommercial educational use would permanently reserve Station WIUJ(FM)'s existing operation and would continue to provide effective Class A service to Charlotte Amalie and the island of St. Thomas.

3. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. An engineering analysis has confirmed that there are no Class A channels available in the noncommercial educational band. Therefore, the allotment and reservation of a commercial channel appears to be the only way to provide a full Class A noncommercial educational channel to Charlotte Amalie.

4. We believe the public interest would be served by proposing the allotment of Channel 275A at Charlotte Amalie and to reserve the channel for noncommercial educational use, since it would provide the community with educational service. An engineering analysis has determined that Channel 275A can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.6 kilometers (6.6 miles) west.⁴

¹ We note that Station WIUJ(FM) is a Class D station and thus is a secondary service. Station WIUJ(FM)'s construction permit for Channel 275D at Charlotte Amalie cannot be modified in the context of a rule making proceeding. Rule making petitions must be filed pursuant to Section 1.401, *et seq.* of the Commission's Rules. However, petitioner filed an amendment acknowledging that although Station WIUJ(FM)'s Class D construction permit cannot be modified, it would still apply for Channel 275A if allotted and reserved for noncommercial educational use.

² Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented

by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. See also *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Red 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

³ Also pending is an application (BMPED-930902IA) to modify Station WIUJ(FM)'s construction permit.

⁴ The coordinates for Channel 275A Charlotte Amalie are North Latitude 18-21-20 and West Longitude 65-01-45.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No.	
	Present	Proposed
Charlotte Amalie,	241B1, 246B,	*226A, ⁵ 241B1,
	250B,	246B,
Virgin Islands	271B, 282B,	250B, 271B,
	287B	*275A 282B, 287B

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 6, 1995**, and reply comments on or before **March 21, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leo Morone, President
Virgin Islands Youth Development Radio, Inc.
P.O. Box 2477
St. Thomas, Virgin Islands 00803
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

⁵ We note that a petition was filed by Virgin Islands Public Television System requesting the allotment of Channel 226A at Charlotte Amalie and its reservation for noncommercial educa-

tional use. A *Notice of Proposed Rule Making* is issued concurrently to cover this proceeding (RM-8501)

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.